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In The

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP; ANGELO K. TSAKOPOULOS,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On a Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS*

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the Petitioners. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 208,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial, and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Many of NAHB's members own and develop land. It is therefore concerned with any judicial decision that affects the regulation of land development.

NAHB submitted an *amicus* brief in this case urging the Court to grant *certiorari*.[2] The central issue concerns

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[1] Pursuant to Rule 37.6 of this Court, *amicus* states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

[2] NAHB has been before the Court as an *amicus curiae* or as "of counsel" representing the interests of property owners in a number of cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995);

the extent of activities over which the Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") can require federal approval through the permitting programs of the Clean Water Act ("CWA"). These are some of the most common permits that NAHB's members must obtain in their projects to provide housing for the Nation's citizens. *Amicus* submits that the Agencies often compel its members to apply for CWA permits beyond the scope of congressional authority. To curb such regulatory overreach, since 1991 NAHB has participated in numerous lawsuits—both as a named party and as an *amicus*—to police the CWA's permitting programs and attempt to stop the Agencies from extending their authority in an unauthorized manner.

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002).

INTRODUCTION

Congress passed the Clean Water Act in 1972 in response to concerns that industrial and municipal facilities were discharging untreated waste materials into the Nation's surface waters. To tackle that problem, the Clean Water Act established a permitting system to regulate the discharge of pollutants into navigable waters. Although the goals of the CWA are ambitious (to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters...."), Congress selected with care the means by which it would pursue those goals. 33 U.S.C. § 1251(a). It did not prohibit all actions that cause some type of environmental damage to an aquatic resource; it focused on *discharges* to navigable waters. The Ninth Circuit, however, has disregarded Congress's carefully chosen words, holding instead that Petitioner's "deep-plowing" to prepare his land for a vineyard must be regulated under Section 404 of the Clean Water Act because it causes "environmental damage." *Borden Ranch Partnership v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 815 n.2, 819 (9th Cir. 2001) (Judge Gould uses the term "deep-plowing" in his dissent).

The Court addressed a similar administrative disregard of congressional language in the same CWA program just two years ago. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001) ("*SWANCC*"), the Corps claimed that isolated, intrastate ponds located on a landfill in northern Illinois were "navigable waters" subject to section 404 permit requirements. The Court rejected this broad assertion of federal authority, observing that the term "navigable

waters" cannot be read out of the statute. *SWANCC,* 531 U.S. at 172.

While *SWANCC* addressed the *geographic* extent of CWA jurisdiction, the case at bench concerns the types of *actions* that the CWA regulates and the specific words Congress selected to specify those *actions*. *Amicus* NAHB will show that CWA jurisdiction is like Venn diagram circles contained within each other:

- First, when Congress enacted the CWA, its overriding goal was to *control water pollution.* (*Infra,* pp. 5-7.)

- Second, one means by which Congress sought to control water pollution was by establishing permit programs in Sections 402 and 404. These permit programs only regulate actions that "*discharge*" or "*add*" materials to navigable waters. (*Infra,* pp. 7-9.)

- Third, Section 404—the particular permit program at issue here—addresses a specific type of addition, the discharge of "*dredged or fill material.*" (*Infra,* pp. 9-11.)

- Fourth, Section 404's scope is further narrowed by the statutory language that directs discharges to *"specified disposal sites."* (*Infra,* pp. 11-13.)

The Ninth Circuit improperly ignored this statutory framework. It ruled that federal regulation was appropriate because Petitioner's plowing activity "constitutes environmental damage." *Borden Ranch Partnership,* 261 F.3d at 815 n.2. This ruling was wrong because Borden Ranch's plowing did not (1) discharge or

add (2) dredged or fill material at a (3) specified disposal site.[3]

In the end, the Ninth Circuit's decision was wrong because it disregards the boundaries of the CWA's effective, coercive—but limited—regime.

ARGUMENT

I. TO MEET THE CLEAN WATER ACT'S GOAL OF CONTROLLING WATER POLLUTION, CONGRESS SPECIFIED THAT FEDERAL AGENCIES CAN ONLY REGULATE "DISCHARGES" THAT "ADD" POLLUTANTS.

A. Congress's Goal: Control Water Pollution.

Waterways burned in the years leading up to the CWA's enactment. "In 1969, the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire. Congress responded to that dramatic event, and to others like it, by enacting the [CWA]." *SWANCC,* 531 U.S. at 174-75 (Stevens, J., dissenting); *see United States v. Ashland Oil and Transportation*, 504 F.2d 1317, 1325 (6th Cir. 1974) (fires on the Schuylkill, Cuyahoga, and Rouge rivers threatened navigation; when it enacted the CWA, "Congress was convinced that uncontrolled

[3] Indeed, the Agencies' approach in Borden Ranch is not unique. Recent Corps and EPA regulations unlawfully extend CWA authority over a vast spectrum of soil movements (not just plowing) merely because those movements affect aquatic resources. Through a regulation issued in January 2001, the Agencies "regard" any "earth-moving activity" caused by a machine as a statutory "discharge" that requires a Section 404 permit—regardless of whether any pollutant is actually *added* when soil is moved. *See* 66 Fed. Reg. 4550, 4575 (2001) (codified at 33 C.F.R. § 323.2 (2001)). (*See infra* pp. 24-26.)

pollution of the nation's waterways is a threat to the health and welfare of the country, as well as a threat to interstate commerce.").

Congress responded to the threats posed by untreated discharges of pollutants into the Nation's surface waters by enacting the Federal Water Pollution Control Amendments of 1972, otherwise known as the CWA, 33 U.S.C. §§ 1251-1387. The CWA's first stated goal is to eliminate "the discharge of pollutants into the navigable waters...." 33 U.S.C. § 1251(a). The CWA also contains myriad programs evidencing Congress's overriding goal to reduce water pollution. [4]

The CWA contains targeted programs to deal with pollution in specific navigable waters of national significance. *See 33 U.S.C.* §§ 1258, 1268 (Great Lakes); *id.* § 1266 (Hudson River); *id.* § 1267 (Chesapeake Bay); *id.* § 1269 (Long Island Sound); *id.* § 1273 (Lake Pontchartrain); *id.* § 1330 (estuaries). The CWA also targets specific types of water pollutants. *See, e.g., id.* § 1257 (mine water pollution); *id.* § 1265 (toxic pollutants); *id.* § 1321 (oil pollution); *id.* § 1345 (sewage sludge).

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[4] *See, e.g.*, 33 U.S.C. §§ 1254-1256 (research and grant programs to study water pollution); *id.* §§ 1281-1301 (federal grant programs for construction of publicly-owned works to pre-treat wastewater entering receiving waters); *id.* §§ 1311-1314 (program regarding effluent limitations from point sources to achieve water quality standards developed by States); *id.* § 1313(d)(1)(C) (requiring States to establish "total maximum daily loads" for certain pollutants, or the maximum permissible level of pollutants allowed in designated impaired waters); *id.* § 1316 (EPA to establish national standards of performance for various industrial sources to develop technologies necessary to control discharge of pollutants); *id.* §§ 1381-1387 (revolving fund program for States to construct treatment works and implement water management programs).

As the primary means to achieve the CWA's goal to limit and ultimately eliminate water pollution, Section 301(a) imposes a blanket prohibition on the "discharge of any pollutant by any person"—unless permitted elsewhere in the Act. *Id.* § 1311(a), 1362(6) and (12); *see International Paper Company v. Ouellette*, 479 U.S. 481, 489 (1987) ("One of the primary features of the [CWA is] a federal permit program designed to regulate the discharge of polluting effluents."); *Rueth v. U.S. E.P.A.*, 13 F.3d 227, 229 (7th Cir. 1993) ("To achieve the purposes of the Act, Congress prohibited the discharge of any pollutants, including dredged or other fill material, except in accordance with the Act.").

Section 404 is one exception to the discharge prohibition. It authorizes the Corps to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). Section 402 is another exception to the discharge prohibition. It authorizes EPA and delegated States to issue permits for discharges of other pollutants, such as industrial and municipal waste. *Id.* §§ 1342, 1362(6).

B. Clean Water Act Framework: Regulate "Discharges" that "Add" Pollutants.

The existence of a "discharge" is the critical, deciding factor in determining whether CWA jurisdiction is triggered and therefore whether a Section 402 or 404 permit is required. Congress defined the term "discharge" to mean an "addition" of a pollutant to navigable waters. 33 U.S.C. § 1362(12). Thus, the CWA regulates only those actions that *add* pollutants to navigable waters. Actions that impact waters but add no pollutants are beyond CWA jurisdiction. *See Save Our Community v.*

U.S.E.P.A., 971 F.2d 1155, 1162-63 (5th Cir. 1992) (absent a discharge, the destruction of a wetland is not regulated by the CWA). Conversely, a discharge that adds pollutants is regulated even if no damaging effects result. *See Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 626-27 (8th Cir. 1979) (discharges are regulated even where water quality is not affected).

The D.C. Circuit has observed the distinction between the CWA regulation of "discharges" and the regulation under a separate statutory scheme of other actions that can adversely affect navigable waters:

> [T]he removal of material from the waters of the United States, as opposed to the discharge of material into those waters, is governed by a completely independent statutory scheme. ... the [Rivers and Harbors Act of 1899] covers the act of dredging, while [CWA] Section 404 [] covers the disposal of the dredged material.

National Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1404 (D.C. Cir. 1998) (citations omitted).

In sum, Congress did not intend the CWA to be an *über*-environmental statute to regulate any activity that could cause aquatic degradation. The Act's scope is narrower: to limit water pollution by regulating actions that "discharge" or "add" pollutants. *See National Mining*, 145 F.3d at 1410.

One reason Borden Ranch's activities fall outside CWA jurisdiction is because the plowing at issue did not "discharge" or "add" a pollutant. Soils may have been

moved around the tines of the plow and earth may have been displaced, but nothing new was added to a navigable water.[5]

II. SECTION 404 IS A LIMITED REGULATORY SUBSET OF THE CLEAN WATER ACT THAT APPLIES ONLY TO DISCHARGES OF "DREDGED OR FILL MATERIAL" INTO NAVIGABLE WATERS AT "SPECIFIED DISPOSAL SITES."

A. Section 404 Applies Only To Additions of "Dredged or Fill Material."

Congress established the Section 404 regulatory program to address one particular type of polluting activity—the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). The Corps relies on Section 404 to assert regulatory authority over and require permits for "the discharge of dredged or fill material into waters of the United States." *See* 33 C.F.R. §§ 323.1, 323.3(a). By its terms, Section 404 and the Corps' implementing

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[5] After *SWANCC*, it is questionable whether Petitioner's land qualifies as "navigable waters" under the CWA. In fact, the scope of CWA geographic jurisdiction after *SWANCC* is the subject of a split in the Circuits. *Compare Rice v. Harken Exploration Co.*, 251 F.3d 264, 269 (5th Cir. 2001), *with Headwaters v. Talent Irrigation Co.*, 243 F.3d 526, 533 (9th Cir. 2001). Nonetheless, geographic jurisdiction has not been raised as an issue in this case because the parties have agreed to assume for purposes of this litigation that the land in question is "navigable waters." To the extent the Court adopts this assumption, *Amicus* respectfully urges the Court to make clear that the issue of geographic jurisdiction is not before it and it is not *holding* that this land is jurisdictional.

regulations apply only to discharges of "dredged or fill material" "into" navigable waters.

Thus, whether an action is subject to Section 404 regulation turns on whether "dredged or fill material" is discharged. (The discharge of fill material is not at issue in this case.[6]) "Dredged material" is not defined in the CWA, but Corps regulations define it as "material that is excavated or dredged *from* waters of the United States." *Id.* at § 323.2(c) (emphasis added). Thus, material must actually be dredged from waters to qualify as "dredged material." This stands to reason. The ordinary meaning of "dredge" is

> *v.* **1** *tr.* **a** (often foll. by *up*) bring up (lost or hidden material) as if with a dredge (*don't dredge all that up again*). **b** (often foll. by *away*, *up*, *out*) bring up or clear (mud, etc.) from a river, harbor, etc. with a dredge. **2** *tr.* clean (a harbor, river, etc.) with a dredge…

Oxford American Dictionary, 291 (Oxford University Press 1999). "Dredge" essentially means to bring material

[6] "Fill material" is material "*placed in* waters of the United States where the material has the effect of … [r]eplacing an aquatic area with dry land" or "[c]hanging the bottom elevation of a water of the United States." 33 C.F.R. § 323.2(e) (July 1, 2002) (emphasis added). The regulatory definition of "discharge of fill material" specifically excludes

> plowing, cultivating, seeding and harvesting for the production of food, fiber and forest products.

Id. at § 323.2(f). Material was not "placed in" waters of the United States by petitioner's activities, and, in any event, petitioner's activities did involve plowing for the production of food products.

up and clear it away from a waterbody (to allow, for example, the movement of vessels in interstate commerce). It follows, as the Corps' regulations apparently recognize, that "dredged material" is material that is actually removed *from* a waterbody, not soil that is merely churned but remains in a waterbody. 33 C.F.R. § 323.2(c). Only material dredged *from* water is "dredged material," and only when that material is subsequently discharged "into" navigable waters is Section 404 triggered. 33 U.S.C. § 1344.[7]

Another reason Borden Ranch's activities fall outside CWA jurisdiction is because the plowing at issue did not dredge material up from a waterbody. The plow may have moved soils around, but it did not dredge material from a waterbody.

B. Section 404's Direction that the Corps Only Permit Discharges at "Specified Disposal Sites" Shows that a Discharge is a Discrete Activity Separate from Dredging.

Section 404 authorizes the Corps to issue permits for the discharge of dredged or fill material into navigable waters "at specified disposal sites." 33 U.S.C. § 1344(a). Congress's use of the term "specified disposal sites" is consistent with the common dredging practice of

[7] Likewise, in the context of Section 404, the Court of Appeals for the Second Circuit has observed that merely recirculating material within a waterbody is not an "addition" triggering a permit requirement. Discussing *National Wildlife Federation v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988), the court noted that a permit was not required because "[t]he navigable water was recirculated, but nothing was added." *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 491 (2nd Cir. 2001).

excavating material *from* one place and dumping it *into* another area—*viz.*, the "specified disposal site."[8] The term "specified disposal site" evidences that Section 404 governs material that is removed and taken away to be discarded (i.e., "disposed"), and ultimately placed at some different point away from the locale of initial dredging (i.e., "specified site."). Thus, by its plain terms, Section 404 envisions and applies to a discharge that adds dredged or fill material at a site specified for "disposal."

Another reason Borden Ranch's activities fall outside the scope of the CWA is that its plow did not dispose of soil and, thus, there was no "disposal site" that could be specified in a Section 404 permit. The plow may have churned soil and moved it around, but it did not take away dirt from a dredging site and dispose of it at a specific location elsewhere. Under the Ninth Circuit's reasoning, any area subject to plowing would be both a dredging site and a specified disposal site, but the statute clearly contemplates that dredging and disposal of dredged

[8] The legislative history indicates that Congress understood "discharge of dredged material" to mean the disposal in one area of material dredged from another area, i.e, dredging and the subsequent disposal of dredged material are two distinct operations. In his remarks during the floor debate, Sen. Muskie stated "There is no question that [the Corps] should retain authority to permit dredging operations . . . But, conversely, spoil disposal should be subject to EPA regulations . . .." 117 Cong. Rec 38797, 38854 (1971); *see also id.* at 38853-54 (colloquy among Senators Ellender, Muskie, and Stennis) (discussing disposal of dredged material in open water, which is "essential since the Secretary of the Army is responsible for maintaining and improving the navigable waters of the United States") and 118 Cong. Rec. 33692, 33699 (1972) (Senate Consideration of Conference Report on S. 2770) (EPA "should have the veto over the selection of the site for dredged spoil disposal and over any specific spoil to be disposed of in any selected site.").

material are separate acts that occur in separate places at separate times. This Congressional language must be given effect. *See SWANCC*, 531 U.S. at 171-72 (unlawful to read terms out of the CWA). Congress could not have intended the tortured reading of the statute the Ninth Circuit would render.

III. THE NINTH CIRCUIT SHOULD BE REVERSED BECAUSE IT UPHELD FEDERAL REGULATION BASED ON A BROAD "ENVIRONMENTAL EFFECTS" TEST, IGNORING THE LIMITED SCOPE AND SPECIFIC TEXT OF THE CLEAN WATER ACT AND SECTION 404 ITSELF.

A. The Ninth Circuit was Wrong.

Again, only (1) "discharges" that "add" (2) "dredged or fill material" at (3) "specified disposal sites" within navigable waters require a Section 404 permit. *See* 33 U.S.C. § 1344(a). Because Petitioner's plowing activity did not meet these requirements, it did not need a Section 404 permit.

Yet the Ninth Circuit upheld the assertion of federal jurisdiction because Borden Ranch's soil movements, in its view, caused environmental harm. Offended by Petitioner's "deep ripping," a form of plowing used to prepare soil for the deep roots of orchards and vineyards, the Ninth Circuit held that "activities that destroy the ecology of a wetland are not immune from [CWA] jurisdiction merely because they do not involve the introduction of material brought in from somewhere else … [Petitioner's activity] constitutes environmental damage

sufficient to constitute a regulable redeposit." *Borden Ranch Partnership*, 261 F.3d at 814-15 n.2.

This conclusion was erroneous and warrants reversal. Environmental damage *per se* cannot be the basis for CWA jurisdiction. The specific textual elements discussed above are prerequisites for Section 404 jurisdiction, and they have not been satisfied in the case at bench.

B. The Other Circuits are Consistent: Only Additions of Material Trigger CWA Jurisdiction.

By concluding that jurisdiction is triggered by "damage" rather than a "discharge," the Ninth Circuit departed from consistent holdings of other circuits. In *National Mining*, the D.C. Circuit vacated a rule that attempted to regulate land-clearing and other excavation activities by characterizing the soil movements accompanying such activities as a "discharge of dredged material." The Agencies argued that soil becomes a pollutant once it is excavated, and that the soil material that inevitably falls off a shovel during such excavation is therefore a discharge of a pollutant. There was no question that the Agencies' purpose in adopting the rule was to reach activities that altered or destroyed wetlands. But the D.C. Circuit held that there can be no "addition" of a pollutant without an addition of material.

> [T]he straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge.

National Mining, 145 F.3d at 1404 (citations omitted).

The Fifth Circuit has likewise held that a discharge into navigable water, not effects, is the jurisdictional prerequisite for regulation under Section 404. In *Save Our Community*, a landfill operator proposed to drain several man-made ponds within the site to make them suitable for landfill use. The Corps and EPA agreed that the operator's draining activities were not regulated because they did not result in an addition of dredged or fill material. The district court held that the proposed activity would destroy wetlands and therefore required a permit. The Fifth Circuit reversed, holding that "absent a finding of discharge, draining activity that converts a wetland does not trigger section 404 jurisdiction . . .." *Save Our Community*, 971 F.2d at 1165-66.[9]

The Ninth Circuit relied on two prior decisions to find that Petitioner's deep ripping qualified as a "discharge." Both of the prior decisions, however, addressed material that was first "dredged" or "excavated" *from* water, then subsequently discharged *into* navigable water. *Rybachek*

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[9] The Eighth Circuit, addressing the same issue from the opposite perspective, has also held that a discharge, not effects, is the deciding factor in triggering CWA jurisdiction. In *Minnehaha Creek Watershed Dist. v. Hoffman*, the lower court held that the construction of dams and placement of riprap into lake waters did not constitute a discharge because there was no evidence that the activities would have detrimental effects. But the Eighth Circuit held that, if a discharge occurs, it will still be regulated regardless of whether the activity involves a "significant alteration in water quality." 597 F.2d 617, 626-27.

v. U.S. E.P.A., 904 F.2d 1276, 1285 (9th Cir. 1990) (where streambed is excavated, then processed to extract gold, subsequent discharge of sifted material into navigable water is regulable); *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000) ("the contractor removed earth and vegetable matter *from* the wetland… once that material was *excavated from* the wetland, its redeposit in that same wetland added a pollutant…") (emphasis added).

In clear contrast to *Rybachek* and *Deaton*, Borden Ranch moved material within waters but did not dredge material *from* a water and subsequently "discharge" it "*into*" a navigable water. The D.C. Circuit recognized this distinction in *National Mining*. 145 F.3d at 1406 ("*Rybachek* would help the agencies if [it held that fallback during placer mining constituted a discharge], but instead it identified the regulable discharge as the discrete act of dumping leftover material into the stream *after* it had been processed.") (emphasis added). The Second Circuit likewise has emphasized that mere recirculation is not an addition:

> If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle). In requiring a permit for such a "discharge," the EPA might as easily require a permit for Niagra Falls.

Catskill Mountains, 273 F.3d at 492.

The Ninth Circuit, however, wrongly excised the jurisdictional trigger of a "discharge of dredged or fill

material *into* the navigable waters" and rewrote Section 404 to regulate soil movements that cause "damage." 33 U.S.C. § 1344(a) (emphasis added).

IV. CURRENT SECTION 404 REGULATIONS ENFORCED BY THE CORPS AND EPA ARE ILLEGAL BECAUSE THEY COVER GENERIC "EARTH-MOVING" ACTIVITIES, REGARDLESS OF WHETHER THOSE ACTIVITIES "DISCHARGE" OR "ADD" ANYTHING TO NAVIGABLE WATERS.

The Ninth Circuit's "environmental effects" test for CWA jurisdiction will only fuel the recent growth of the Section 404 regulatory state. Since 1991 the Corps and EPA have issued three separate regulations and innumerable bits of "guidance," all in an effort to redefine "discharge of dredged material" to capture more and more activities. In so doing, the Agencies have alchemized "discharge" to cover sweeping categories of activities that cannot remotely be construed to "add" anything to jurisdictional waters. Even if the subject activity *removes* or *excavates* material, the Corps and EPA nonetheless require a Section 404 permit through its current regulations.

The timeline below lays bare the Agencies' extra-jurisdictional attempts to regulate based on environmental effects. It chronicles the "pull" of the courts to give the effect to the term "discharge" and the Agencies' reactive, expansive "push" to cover virtually any action that subtracts soil from, or moves soil around in, a navigable water. Such regulatory overreach will continue unabated unless the Court overrules the Ninth Circuit and sends

strong cautionary words about the limits of CWA jurisdiction.

A. 1972-1990: Early Regulations Were Faithful to the CWA.

During the first 18 years that the Corps and EPA enforced the CWA, they faithfully interpreted Section 404 in a manner confirming that "discharge" required an addition of materials. In 1977, the Corps promulgated final regulations defining the term "discharge of dredged material" as "any addition of dredged material into waters of the United States." 42 Fed. Reg. 37,122, 37,145 (1977). Guidance issued in 1981 and reissued in 1984 reinforced the understanding that additions were regulated, but removals and other soil movements were not:

> [Section 404] does not authorize the Corps to regulate dredging in [waters of the United States] .... *De minimus* discharge occurring during normal dredging operations, such as the drippings from a dragline bucket, is not considered to be a Section 404 discharge.[10]

In 1986 the Agencies issued revised Section 404 regulations that remained consistent with the idea that activities involving incidental soil movement were not regulated. *See* 33 C.F.R. § 323.2(d) (1992) (Corps regulations); 40 C.F.R. § 232.2(e) (1992) (EPA regulations). In the preamble to its 1986 regulations, the

[10] U.S. Army Corps of Engineers, Regulatory Guidance Letter 81-4: Application of Section 404 to Dredging Projects ¶¶ 1-2 (June 3, 1981); U.S. Army Corps of Engineers, Regulatory Guidance Letter 84-4: Application of Section 404 to Dredging Projects ¶¶ 2-3 (Mar. 23, 1984) (reissuance of RGL 81-4).

Corps plainly acknowledged: "We have consistently provided guidance to our field offices since 1977 that incidental fallback is not an activity regulated under section 404." 51 Fed. Reg. 41,206, 41,210 (1986).

B. 1991: Tulloch Rule 1 Purports to Regulate "Incidental Fallback."

The regulatory landscape shifted in 1991, when environmental groups sued the Agencies and two landowners, alleging that the landowners' clearing and excavation activities destroyed and degraded wetlands and therefore should be subject to Section 404 regulation. *North Carolina Wildlife Fed'n v. Tulloch,* No. C90-713-CIV-5-BO (E.D.N.C. 1992). Rather than defend the lawsuit, the Corps and EPA settled by agreeing to amend their rules to regulate landclearing and excavation. On August 25, 1993, the agencies adopted a final rule—commonly known as the Tulloch Rule (hereafter "Tulloch 1")—that was virtually identical to the language dictated by the parties' settlement agreement. *See* 58 Fed. Reg. 45,008 (1993).

Tulloch 1 purported to extend the Agencies' authority to a new category of activity known as "incidental fallback": "any redeposit of dredged material . . . which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 58 Fed. Reg. at 45,035, 45,037. Because it is "virtually impossible" to excavate or clear land without causing some incidental soil movement (*see id.* at 45,017), and because such incidental soil movement was now considered a "discharge," *for the first time since the CWA's inception,* Tulloch 1 required a Section 404 permit for all actions that removed soils from, or pushed soils in,

jurisdictional waters. The Agencies acknowledged that their decision to now regulate incidental fallback was not driven by concern about the incidental soil movement itself, but rather by concern about adverse effects resulting from the underlying excavation activities. *See* 58 Fed. Reg. at 45,019. Characterizing incidental soil movement as a "discharge" thus provided the pretext for regulating removal, ditching, plowing, and other soil-moving activities that the Agencies had no authority to regulate directly under the Act.

C. 1997-1998: Federal Courts in the D.C. Circuit Strike Tulloch 1 As Facially Invalid Because the Rule Regulated Activities that Did Not Add Materials.

In 1993, *Amicus* NAHB and other trade groups challenged Tulloch 1 as exceeding the Corps' and EPA's authority. The U.S. District Court for the District of Columbia agreed with NAHB. Recognizing that Section 404 regulates only "discharges" (and not removal or soil disturbance *per se*), the district court found Tulloch 1 "inconsistent with the language and intent of the [CWA]." *American Mining Congress v. U.S. Army Corps of Eng'rs,* 951 F.Supp. 267, 270 (D.D.C. 1997). "[Congressional] understanding of 'discharge' excludes the small-volume incidental discharge that accompanies excavation and landclearing activities." *Id.* at 273. Accordingly, the district court "declared [Tulloch 1] invalid" and entered a permanent injunction ordering the agencies "not to appl[y] or enforc[e]" the rule. *Id.* at 278.

The U.S. Court of Appeals for the D.C. Circuit affirmed without dissent in *National Mining.* The appeals court examined the administrative record and concluded

that Tulloch 1 stretched federal authority to reach, among other things, the "soils and sediments [that] fall from the bucket" during excavation operations, and the "scrap[ing] or displac[ement of] wetland soil" during mechanized landclearing." *National Mining*, 145 F.3d at 1403 (citing Tulloch 1 preamble, 58 Fed. Reg. at 45,017-018). However, such an extension of authority flouted Congress's definition of "discharge" because it did not require some "addition" of material. *Id.* at 1404. Simply, "how [can there] be an addition of dredged material when there is no addition of material"? *Id.*

D. 1997-1999: Corps and EPA Efforts to Circumvent the *AMC* and *National Mining* Opinions and Regulate Excavation and Other Soil Movements *Per Se.*

The Corps and EPA responded with a campaign of resistance to *AMC* and *National Mining.* An EPA official derided these decisions as creating a "loophole" in the statute. Memorandum from J. Charles Fox, Assistant Administrator for Water, to The Administrator, "Impacts to Public Health and the Environment Associated with the 'Tulloch' Decision—ACTION MEMORANDUM" (June 1, 1999). The Corps also issued a document styled as "'Interim, Interim' Information Regarding the 'Excavation Rule' Decision, *American Mining Congress v. Corps*" (February 13, 1997)). The "Interim, Interim Information" instructed Corps field officials that they could properly assert jurisdiction over incidental fallback, notwithstanding the result in *AMC*, by bootstrapping authority over some other part of a larger project where a regulable addition of material had in fact occurred. The "Interim, Interim Information" directed that "many projects that could be built with only 'incidental fallback,' . . . also need Corps

authorization for access roads or other parts of the project … [T]he excavation [*i.e.*, non-regulated] part of the project can be treated as secondary impacts of the parts of the overall project that we do regulate."

Next came "Tulloch 2," an "interim" rule published on May 10, 1999, pending a formal rulemaking to comply with *National Mining*. *See* 64 Fed. Reg. 25,120 (1999). Although styled as an attempt to comply with the *AMC* and *National Mining* decisions, Tulloch 2 was nothing more than a resuscitation of the rejected Tulloch Rule 1. Based on the plain text of Tulloch 2,[11] the agencies continued to unlawfully regulate soil ("excavated material") inevitably displaced as an "incidental" byproduct of landclearing or "other [mechanized] excavation." Because virtually all mechanized operations in jurisdictional waters move around grains of soil, Tulloch 2 regulated a vast array of activities regardless of whether material was actually added to the waterbody.[12]

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[11] The May 10, 1999, rule changed the language of Tulloch 1 as follows: "Any addition of dredged material into, including redeposit of dredged material other than incidental fallback, within, the waters of the United States. The term includes, but is not limited to the following:*** any addition, including any redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing . . . or other excavation." 64 Fed. Reg. at 25,123.

[12] The preamble to Tulloch 2 offered a predictably cramped explanation of the minimalist changes made from Tulloch 1. In the Tulloch 2 preamble the Agencies stated that *National Mining* invalidated Tulloch 1 *only* because it impermissibly regulated incidental fallback. 64 Fed. Reg. at 25,120. While leaving to another day the question of what types of redeposits might constitute incidental fallback, in one portion of the Tulloch 2 preamble the Corps and EPA declared categorically that soil movements associated with "mechanized landclearing" are automatically "redeposits…subject to CWA jurisdiction…" *Id.* at 25,121.

E. 2000: The *AMC* Court Cautions the Agencies Against Taking an "Unduly Narrow" Interpretation of Non-Regulated Activities.

After Tulloch 2's issuance NAHB returned to the D.C. District Court, arguing that the interim rule violated the court's injunction that forbade the Agencies to apply or enforce Tulloch 1. The district court ruled that Tulloch 2 did not violate the injunction because it was only an interim step. However, the court also criticized the Agencies' cramped interpretation of incidental fallback, stating that it did "not comport with the Court's understanding . . .." *American Mining Congress v. U.S. Army Corps of Eng'rs,* No. CIV.A. 93-1754, 2000 U.S. Dist. LEXIS 13953 at **24 (D.D.C. Sept. 13, 2000) (hereafter "*AMC II*"). The district court further "caution[ed] [the Agencies] against parsing the language of the decisions in *[National Mining]* and *AMC* to render a narrow definition of incidental fallback that is inconsistent with an objective and good faith reading of those decisions." *AMC II,* 2000 U.S. Dist. LEXIS 13953, at **25. To "ensure" that the Agencies did not take an "unduly narrow definition" of "incidental fallback," the district court emphasized that the Agencies have authority to regulate only some forms of soil redeposits—namely, those that add materials to navigable waters. *Id* at **23, **25. In this regard, the district court emphasized the following language from *National Mining:*

> But [Tulloch 1] makes no effort to draw … a line [between regulated and non-regulated redeposits], and indeed its overriding purpose appears to be to expand the Corps' permitting authority to encompass . . . a wide range of activities that cannot remotely be said to "add" anything to the waters of the United States.

AMC II, 2000 U.S. Dist. LEXIS 13953, at **17.

F. 2001: The Agencies Issue Tulloch 3 and "Regard" Vast Categories of Soil Moving Activities as Regulated "Discharge."

The D.C. District Court did not strike Tulloch 2, in large measure, because it was an interim rule that would be followed by "a notice and comment rulemaking 'to make a reasoned attempt to more clearly delineate the scope of CWA jurisdiction over redeposits of dredged material.'" *AMC II,* 2000 U.S. Dist LEXIS 13593 at, **19-**20 (citing Tulloch 2, 64 Fed. Reg. at 25,121). That new rule—"Tulloch 3"—is in effect today and governs the Agencies' present regulatory regime. Tulloch 3 is another revision of the term "discharge of dredged material." *See* 66 Fed. Reg. 4550 (2001). It suffers from the same defect as its predecessors because it regulates all earth-moving activities (e.g., land-clearing, ditching) simply because they move soils, not because they cause *discharges* that *add* pollutants.

Tulloch 3 declares that, despite whether any addition of material actually occurs, the Corps and EPA "regard" all landclearing and other "earth-moving activity" in navigable waters "as resulting in a discharge of dredged

material"—unless the regulated entity convinces the Agencies with "project specific evidence" that the activity results in "only incidental fallback." 66 Fed. Reg. at 4575. Through Tulloch 3, the Agencies have effectively presumed that any earth-moving activity is regulated as a CWA discharge.[13] Whether the activity is plowing or excavation, Tulloch 3 is a sweeping assertion of federal jurisdiction over activities that do not add materials to waters of the United States. As a result, Tulloch 3 is currently the target of yet another court challenge filed by *Amicus. See National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, No. 1:01CV00274 (D.D.C. filed Feb. 6, 2001) (consolidated with 1:01CV00320). That litigation has been stayed by the parties pending a decision from the Court in the case at bench.

With all of their regulatory machinations over the past nine years, the Agencies' motivation has become apparent. What they *really* want is to regulate any activity that has an adverse effect on any water anywhere. However, the language of the CWA—specifically the term "discharge of dredged material at specified disposal sites"—limits what they may regulate. As the courts in the D.C. Circuit and Judge Gould's dissent below have observed, if the Agencies are not satisfied with the CWA as it now stands,

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[13] When the agencies initially proposed Tulloch 3, they sought to establish a rebuttable presumption that all mechanized earth-moving activities resulted in a regulable discharge. 65 Fed. Reg. 50,108 (Aug. 16, 2000). The final version of Tulloch 3 dropped the "presumption" language in favor of language that "regard[s]" earth-moving activities in waters of the United States as regulated. Tulloch 3, 66 Fed. Reg. at 4575 (Jan. 17, 2001). Word choice aside, the impact on the regulated community is the same: the Agencies presume that all mechanized movement of soil in a navigable water will require a Section 404 permit.

they should go to Congress to amend the CWA for language that suits their broader agenda. *See Borden Ranch Partnership*, 261 F.3d at 821 (Judge Gould dissenting).

CONCLUSION

For all of the foregoing reasons, the Ninth Circuit's decision should be reversed.

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